

William H. Schwarzschild, III, VSB No. 15274
Paul S. Bliley, Jr., VSB No. 13973
WILLAMS MULLEN
Two James Center, 16th Floor
1021 East Cary Street
Post Office Box 1320
Richmond, Virginia 23218-1320
Phone: 804.783.6489
804.783.6448
Fax: 804.783.6507
tschwarz@willamsmullen.com
pbliley@willamsmullen.com
Counsel for 1890 Ranch, Ltd.

Michael Deitch
Tex Bar Number 05644550
800 Rio Grande Street
Austin, Texas 78701
512.474.1554
512.474.1579 Fax
Mike.d@dhpc-law.com

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re	§	Chapter 11
	§	
CIRCUIT CITY STORES, INC., et. al.,	§	Case No. 08-35653 (KRH)
	§	Jointly Administered
Debtors	§	Response Deadline: June 26, 2012, 4:00 pm

**RESPONSE OF 1890 RANCH, LTD. TO LIQUIDATING TRUST'S THIRTY-NINTH
OMNIBUS OBJECTION TO LANDLORD CLAIMS (REDUCTION OF CERTAIN
INVALID CLAIMS-MITIGATION)
(Claim No. 6334)**

1890 Ranch, Ltd. ("1890 Ranch") responds (the "Response") to the Liquidating Trust's Thirty-Ninth Omnibus Objection to Landlord Claims (the "Objection"). In the Objection, the Liquidating Trust asserts that 1890 Ranch's Claim No. 6334 (the "Claim") filed in the amount of \$634,562.59 should be reduced to \$0.00. 1890 Ranch opposes the relief sought by the Liquidating Trust in the Objection and asks that the claim be allowed in the full amount in which it is filed. In support of its Response, 1890 Ranch states the following:

1. 1890 Ranch's claim is based upon a Lease Agreement (the "Lease") dated effective on or about March 26, 2007 between it, as Landlord, and the Debtor Circuit City Stores,

Inc., as Tenant, for the premises at 1335 E. Whitestone Boulevard, Suite G, Cedar Park, Texas 78613.

2. The Lease was deemed rejected as of December 31, 2008 pursuant to the Court's "Order Under 11 U.S.C. §§ 105, 363, and 365 (I) Approving Bidding and Auction Procedures For Sale of Unexpired Nonresidential Real Property Leases for Closing Stores, (II) Setting Sale Hearing Date, and (III) Authorizing and Approving (A) Sale of Certain Nonresidential Real Property Leases Free and Clear of Liens, Claims, and Encumbrances, (B) Assumption and Assignment of Certain Unexpired Nonresidential Real Property Leases, and (C) Lease Rejection Procedures" dated December 10, 2008.

3. 1890 Ranch timely filed its Proof of Claim Including Rejection Damages on January 27, 2009. The Proof of Claim was received and logged in as Claim No. 6334 in this case.

4. The Liquidating Trust's Objection asserts the 1890 Ranch's claim should be reduced to \$0.00 subject to modification upon timely receipt of mitigation information.

5. Under 11 U.S.C. § 365(g)(1), 1890 Ranch is entitled to assert a claim for damages resulting from Debtor's rejection of its Lease with 1890 Ranch as a breach of the Lease occurring immediately prior to the petition date. A claim for damages is determined under the terms of the Lease and under applicable non-bankruptcy law.

6. The Lease between 1890 Ranch and Debtor expires January 31, 2018. The measure of damages in the Lease is Debtor's remaining annual minimum rent, share of CAM costs, share of taxes and other sums payable in the lease *less* the net proceeds, if any, of any reletting after deducting from such proceeds all of 1890 Ranch's reasonable expenses in connection with reletting, including but not limited to, reasonable brokerage commissions and

reasonable alteration costs and expenses of preparation for such reletting. 1890 Ranch's claim for actual damages for termination of the Lease under 11 U.S.C. § 365(g)(1) is approximately \$2,479,624.43 after taking mitigation into account. *See* the worksheet attached as Exhibit "1" and incorporated herein by reference.

7. 1890 Ranch filed its claim for \$643,562.59¹ under the statutory damage cap in 11 U.S.C. § 502 (b)(6). The damage cap is calculated on "the rent reserved by the lease" and is not subject to mitigation.

8. *In re Shane Co.*, 464 B.R. 32, 43 (2012), the Court stated:

"The effect of mitigation is an element of the calculation of damages under state law and is properly considered in the calculation of damages. But to import mitigation into the calculation of the cap set out in § 502(b)(6) would be to judicially amend a statute that is plain on its face. The statutory language is devoid of any reference to—or even logical suggestion of—taking mitigation into account in calculating the damages cap under § 502(b)(6).

The statute speaks of "the rent reserved by such lease" for one year or for 15% of the remaining term, whichever is greater, not to exceed three years. The calculations required under § 502(b)(6) are not complicated and may be accomplished solely by reference to the agreement between the parties. It is only that agreement that is cited in the statute as the standard by which the damage cap is calculated. If Congress had intended the courts to import mitigation into that calculation, it provided no evidence of that intent in the statutory language it chose."

9. 1890 Ranch has met its mitigation burden and applicable mitigation occurred in its damage claim under 11 U.S.C. § 365(g)(1). There is no authority to reduce or disallow 1890 Ranch's claim as it is capped under 11 U.S.C. § 502 (b)(6).

10. The party with authority to discuss mitigation issues and the facts stated in this Response is:

¹ 1890 Ranch's claim for damages allowed under 11 U.S.C. § 502(b)(6) is \$644,609.21. Debtor has a pre-petition credit of \$523.31 which 1890 Ranch applied against the claim.

Colin Bearden
Endeavor Real Estate Group
504 Lavaca Street, Suite 1160
Austin, Texas 78701
512/ 682-5541
512/ 682-5506 Fax
cbearden@endeavor-re.com

in the presence of, or together with, counsel

Michael Deitch
Law Office of Michael Deitch
800 Rio Grande
Austin, Texas 78701
512/ 474-1554
512/ 474-1579 Fax
Mike.d@dhpc-law.com.

WHEREFORE, 1890 Ranch, Ltd. requests that the Court deny the Liquidating Trust's
Objection to Claim No. 6334 and that the Claim be allowed by Court order in the amount of
\$643,562.59.

Dated: June 21, 2012

1890 RANCH, LTD.

By /s/ Michael Deitch

By /s/ Paul S. Bliley, Jr.
Of Counsel

Michael Deitch
Tex Bar Number 05644550
800 Rio Grande Street
Austin, Texas 78701
512.474.1554
512.474.1579 Fax
Mike.d@dhpc-law.com
Pro Hac Vice (Order entered 12/18/2008)

William H. Schwarzschild, III, VSB No. 15274
Paul S. Bliley, Jr., VSB No. 13973
WILLAMS MULLEN
Two James Center, 16th Floor
1021 East Cary Street
Post Office Box 1320
Richmond, Virginia 23218-1320
Phone: 804.783.6489
804.783.6448
Fax: 804.783.6507
tschwarz@willamsmullen.com
pbliley@willamsmullen.com
Of Counsel for 1890 Ranch, Ltd.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 21st day of June, 2012, a copy of the Response of 1890 Ranch, Ltd. to Liquidating Trust's Thirty Ninth Omnibus Objection to Landlord Claims (Reduction of Certain Invalid Claims-Mitigation)(Claim No. 6334) has been served on the following:

Jeffrey N. Pomerantz, Esq.
Andrew W. Caine, Esq.
Pachulski Stang Ziehl & Jones, LLP
10100 Santa Monica Boulevard
Los Angeles, California 90067-4100

Lynn L. Tavnner, Esq.
Paula S. Beran, Esq.
Tavanner & Beran, PLC
20 North Eighth Street, 2nd Floor
Richmond, Virginia 23219

via the Electronic Case Filing (ECF) system, as appropriate.

/s/ Paul S. Bliley, Jr.
Paul S. Bliley, Jr.

EXHIBIT 1

Lease Agreement between 1890 Ranch, Ltd and Debtor dated effective on or about March 6, 2007 for approximately 20,304 square feet. Lease deemed rejected as of December 31, 2008.	
Lease expires 1/31/2018	
Base Rent \$30,664.38 per month Additional Rent \$8,761.26 per month	109 months x \$39,425.64 = \$4,297,394.76

Circuit City lease premises split into two spaces.

Lease One - Lease Agreement between 1890 Ranch, Ltd. and Dollar Tree Stores, Inc. dated June 8, 2010 for approximately 10,306 square feet.	
Lease expires 1/31/2016 (1 st payment 12/7/2010)	
Base Rent \$9,522.33 per month Additional Rent \$5,359.12 per month	60 months x \$14,881.45 = \$892,887.00
Tenant Finish out Allowance	<\$233,706.00>
Leasing Commission	<\$63,070.00>
Mitigation amount for Lease 1	\$596,111.00

Lease Two - Lease Agreement between 1890 Ranch, Ltd. and Vitamin Cottage Natural Food Markets, Inc. dated September 1, 2010 for approximately 10,515 square feet.	
Lease expires 3/31/2021 (1 st payment 3/3/2011)	
Base Rent 1-5 \$12,267.50 per month	60 months x \$12,267.50 = 736,050.00
Base Rent 6-10 \$12,705.63 per month	21 months (thru 1/31/2018) x \$12,705.63 = \$266,818.23
Additional Rent \$6,195.10 per month	81 months x \$6,195.10 = \$501,803.10
Tenant Finish out Allowance	<\$172,079.00>
Leasing Commission	<\$110,933.00>
Mitigation amount for Lease 2	\$1,221,659.33

Total Lease Rejection Damages After Mitigation	\$2,479,624.43
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